

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
ASC COMMUNICATIONS, INC.	)	
	)	
Licensee of Multipoint Distribution Service	)	
Station WMH541, San Diego, California –	)	
Request for Declaratory Ruling	)	
	)	
Application for Extension of Time to Construct	)	File No. 9650762
	)	
Application for Assignment of Conditional	)	File No. 19991202AAE
License	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 14, 2004**

**Released: December 15, 2004**

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we address ASC Communications, Inc.'s (ASC) request for additional time to construct Multipoint Distribution Service (MDS)<sup>1</sup> Station WMH541, San Diego, California,<sup>2</sup> as well as a related petition for declaratory ruling.<sup>3</sup> We also address ASC's application for authority to assign the conditional license for Station WMH541 to USSC.<sup>4</sup> For the reasons stated below, we grant the Amended Request and determine that ASC has shown good cause for additional time to construct Station WMH541.

<sup>1</sup> On July 29, 2004, the Commission released a comprehensive restructuring of the rules relating to MDS and the Instructional Television Fixed Service (ITFS). Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*MDS/ITFS R&O & FNPRM*). As part of that restructuring, MDS was renamed the Broadband Radio Service (BRS). Because this case involves applications filed under the old rules, and because the new rules have not yet taken effect, we will use the old name for the service in this ruling.

<sup>2</sup> File No. 9650762 (filed Apr. 19, 1996). This application was filed by U. S. Satellite Corporation (USSC), predecessor-in-interest to ASC.

<sup>3</sup> Amended Request for Declaratory Ruling (filed Mar. 12, 1997) (Amended Request). This request was also filed by USSC.

<sup>4</sup> File No. 19991202AAE (filed Dec. 2, 1999) (ASC-USSC Assignment Application).

## II. BACKGROUND

2. On July 22, 1993, USSC was issued a conditional license for Station WMH541.<sup>5</sup> One of the conditions on the license required USSC to demonstrate that it would not cause interference to Instructional Television Fixed Service (ITFS) licensees within 50 miles of USSC's proposed transmitter site.<sup>6</sup> On July 22, 1994, USSC filed its first of several applications for additional time to construct the station.<sup>7</sup> On the same date, USSC also filed (1) a request for declaratory ruling that it would not cause interference to any ITFS station within 50 miles of USSC's proposed transmitter site,<sup>8</sup> and (2) a minor modification application to change the antenna polarization of its proposed station from vertical to horizontal.<sup>9</sup> USSC's request for declaratory ruling was premised on the grant of its minor modification application.<sup>10</sup> The former Mass Media Bureau dismissed USSC's modification application on April 15, 1996.<sup>11</sup> USSC did not seek reconsideration of this action. The initial extension application was granted on August 18, 1994, for a period of six months, until February 18, 1995.<sup>12</sup> USSC filed subsequent extension applications, each of which were granted, which extended its construction deadline to April 26, 1996.<sup>13</sup> On April 19, 1996, USSC filed a further request for extension of time, pending such time as the Commission would act on forthcoming petitions and applications from USSC.<sup>14</sup>

3. On March 12, 1997, USSC filed an amended request for declaratory ruling.<sup>15</sup> In the amended request, USSC alleged that with certain permissive modifications, it could demonstrate that it would not cause interference to any ITFS stations within 50 miles of its proposed transmitter site.<sup>16</sup> The Board of Trustees, California State University; licensee of ITFS Station WHG403, San Diego, California, the San Diego County Superintendent of Schools, licensee of ITFS Station WCX487, San Marcos, California, and Palomar College licensee of ITFS Station WGR707, San Marcos, California (collectively,

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<sup>5</sup> File No. BPMD-8314693.

<sup>6</sup> *Id.*

<sup>7</sup> File No. BEMD-9450797.

<sup>8</sup> Request for Declaratory Ruling (filed Jul. 22, 1994) (First Request).

<sup>9</sup> File No. BMPMD-9450798.

<sup>10</sup> First Request at

<sup>11</sup> Letter from Stephen Zak, Video Services Division, Mass Media Bureau to Irving Gastfreund (Apr. 15, 1996); *see also* Mass Media Bureau Multipoint Distribution Service Actions, *Public Notice*, Report No. D-851-A (released May 8, 1996).

<sup>12</sup> File No. BEMD-9450797 (granted Aug. 18, 1994).

<sup>13</sup> File Nos. BEMD-9550472 (granted Apr. 7, 1995), BEMD-9650034 (granted Oct. 25, 1995).

<sup>14</sup> Extension Application. Pacific Telesis Enterprises (PTE), the San Diego Basic Trading Area (BTA) holder, filed an informal objection on January 17, 1997. USSC opposed PTE's informal objection on March 12, 1997. PTE and, subsequently, Southern Wireless Video, Inc. – the assignee of PTE's MDS and MMDS licenses (originally as Pacific Telesis Southern Wireless Video, Inc.) sought numerous extensions of time to respond in order to attempt a negotiated settlement between the parties. On November 12, 1998, USSC opposed further motions for extension of time, maintaining that a settlement was unlikely. On December 17, 2002, WorldCom Broadband Solutions, Inc., successor-in-interest to PTE, withdrew the informal objection filed by PTE.

<sup>15</sup> Amended Request.

<sup>16</sup> *Id.* at 2.

San Diego Schools) responded to USSC's amended request for declaratory ruling on March 31, 1999.<sup>17</sup> USSC filed a reply on April 12, 1999.<sup>18</sup>

4. On June 16, 1999, USSC filed an application for a *pro forma* assignment of the conditional license of WMH541 to ASC. Consent to this assignment was granted on June 22, 1999, "conditioned upon the outcome of all pending legal proceedings involving the subject conditional license."<sup>19</sup> On December 2, 1999, ASC filed an application for assignment of WMH541's conditional license back to USSC.<sup>20</sup>

### III. DISCUSSION

5. The San Diego Schools do not directly challenge ASC's analysis demonstrating that Station WMH541, as proposed in the Amended Request, would not cause interference to the San Diego Stations. Instead, the San Diego Stations express three concerns: (1) that the terrain may cause "reflective" interference,<sup>21</sup> (2) that some of the receive site upgrades proposed by ASC may not be feasible because of zoning or structural issues,<sup>22</sup> and (3) that ASC may have difficulty in providing interference protection to two receive sites.<sup>23</sup> The San Diego Schools ask that three conditions be placed on any extension granted to USSC:

1. USSC and/or its excess capacity lessee, WHI, jointly and severally, shall work with the Schools to design appropriate engineering solutions (such as receive site upgrades), and bear all costs associated with such solutions, to eliminate objectionable interference to the receive sites of the Schools' ITFS Stations.

2. In the event such engineering solutions are not in place and working to avoid interference at the commencement of Station WMH541's operations, and at all times thereafter, USSC and/or its excess capacity lessee, must cease operation of MMDS Station WMH541, or reduce power, as necessary, to eliminate objectionable interference to the receive sites of the Schools' ITFS Stations, until such time as engineering solutions can be implemented, tested and determined to resolve the interference.

3. USSC and/or WHI shall work with the Schools to reach a fair estimate of all expenses related to the engineering solutions (including reasonable engineering and legal expenses, as well as receive site upgrades). USSC and/or WHI should be required to place that estimated amount in escrow so that sufficient funds are available to resolve interference problems as they occur.<sup>24</sup>

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<sup>17</sup> Response to Amended Request for Declaratory Ruling (filed Mar. 31, 1999) (Response).

<sup>18</sup> Reply (filed Apr. 12, 1999).

<sup>19</sup> Letter from Kim Varner, Staff Attorney, Video Services Division, Mass Media Bureau to Max G. Worthington (Jun. 22, 1999).

<sup>20</sup> USC-ASSC Assignment Application.

<sup>21</sup> Response at 2.

<sup>22</sup> *Id.* at 2-3.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.* at 3-4.

In response, USSC offers assurance that it fully intends to comply with the Commission's Rules regarding its ongoing obligation to provide interference protection to the San Diego Schools.<sup>25</sup> It argues that the special conditions requested by the San Diego Schools are unprecedented and unnecessary.<sup>26</sup>

6. We conclude that a grant of the Amended Request is in the public interest. The San Diego Schools do not take issue with USSC's demonstration that the facilities proposed in the Amended Request comply with the Commission's current rules regarding interference protection. We decline to impose the specific conditions requested by the San Diego Schools. While the parties discuss their obligations under the rules in effect at the time they filed the pleadings, the rules have changed. The Commission has granted BRS and EBS licensees greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.<sup>27</sup> Among other things, the Commission changed the rules in issue by (1) establishing geographic area licensing for BRS and EBS stations, (2) limiting power at the edge of each station's geographic service area, and (3) establishing new interference protection criteria.<sup>28</sup> ASC will be required to protect co-channel and adjacent-channel ITFS stations based upon the new rules. We believe the new rules adequately define ASC's obligations to ITFS licensees, and we therefore decline to impose the special conditions requested by the San Diego Stations. We note, however, that the Commission has sought comment on modifying the rules governing the relationship between grandfathered E and F channel ITFS stations (such as Stations WCX487 and WGR707) and MDS stations operating on the E and F channel groups.<sup>29</sup> Any grant of ASC's application for extension of time to construct will be subject to any rule changes the Commission may adopt in WT Docket No. 03-66 regarding the relationship between grandfathered E and F channel EBS and BRS stations.

7. We also conclude that ASC has demonstrated good cause for an extension of time to construct. The Commission has not required licensees or permittees to construct if the grant of the license is not a final action.<sup>30</sup> In this case, since the grant of the license was conditioned upon grant of USSC's Amended Request, ASC clearly could not construct until there was a ruling on the Amended Request. We believe this case is analogous to the situation where there is a pending challenge to the grant of an application. Given the passage of time since the filing of the Amended Request, we do not believe it would be in the public interest to deny ASC an extension because of its delay in filing the Amended Request after the dismissal of its First Request. Accordingly, we will direct processing of the Extension Application. We will also direct processing of the ASC-USSC assignment application.

#### IV. CONCLUSION AND ORDERING CLAUSES

8. We conclude that a grant of the Amended Request is in the public interest, and we also conclude that ASC has show good cause for an extension of time to construct. We direct processing of the Extension Application and the ASC-USSC Assignment Application.

9. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.2 of the Commission's Rules, 47 C.F.R. §

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<sup>25</sup> Reply at 2.

<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> *MDS/ITFS R&O & FNPRM, supra.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, 19 FCC Rcd at 14288-91 ¶¶ 333-343.

<sup>30</sup> See California State University, Sacramento, *Memorandum Opinion and Order*, 13 FCC Rcd 17960, 17965 ¶ 15 (1998), Rainbow Broadcasting Company, *Hearing Designation Order*, 11 FCC Rcd 1167, 1168 (1995).

1.2, that the Amended Request for Declaratory Ruling filed by U.S. Satellite Corporation on June 12, 1997 IS GRANTED.

10. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 21.38, 21.39, and 21.40 of the Commission's Rules, 47 C.F.R. §§ 21.38, 21.39, 21.40, that the licensing staff of the Broadband Division SHALL PROCESS the application for extension of time to construct Station WMH541 filed on April 19, 1996 (File No. File No. 9650762) and the application for assignment of license filed on December 2, 1999 (File No. 19991202AAE) in accordance with this *Memorandum Opinion and Order* and the Commission's Rules and policies.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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